**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Jody L. Oelschlager, D.V.M. and**
**Charles K. Wilson,**
**Plaintiffs Below, Petitioners**



**vs.** **Docket No. 21-0784**

**Garen E. Francis, Diana L. Francis,**
**and Daniel E. Francis,**
**Defendants Below, Respondents**

# PETITIONERS' REPLY BRIEF

D. Kevin Coleman (W.Va. State Bar # 6018)
FARMER, CLINE & CAMPBELL, PLLC
453 Suncrest Towne Ctr., Suite 300
Morgantown, WV 26505
(304) 225-5990
dkcoleman@fcclaw.net

## ARGUMENT

The Respondents' argue that they did all that reasonably could have been done to uncover the truth of the Petitioners' claim to the garage tract; and that it was reasonable for them to conclude, based on all the evidence, that Petitioners were merely mistaken in their belief that they still owned the garage. Indeed, this is precisely what the trial court found below.

This argument and the trial court's holding begs the question – what precisely did the Respondents do once they were on notice of Petitioners' adverse claim to the garage? The answer: nothing.

On September 11, 2019, Respondent Diana Francis contacted the Petitioners' realtor who informed Mrs. Francis that the Petitioners were selling the property next door along with the garage at the rear of the 2205 First Street property. Respondents' Brief, p. 4; J.S. ¶26. On September 13, 2019, the respondents obtained the 2009 deed by which the Petitioners conveyed the property at 2205 First Street to Thomas Hunt. Respondents' Brief, p. 4; J.S. ¶26. The deed revealed that the garage was included in the property conveyed by the Petitioners to Hunt.

At that point, the Respondents were fully informed that the Petitioners were continuing to claim ownership over and, indeed, attempting to sell (again?) the garage they appeared to have sold ten years earlier to Hunt. Once they learned off the conflict between the 2009 deed and the Petitioners' current claim of ownership over the garage, the Respondents took no further action until September 16, 2019 - the date of the foreclosure sale. That day, before closing on the purchase of 2205 First Street, Respondent Garen Francis called Petitioners' realtor who again confirmed that the garage was included in the Petitioners' sales listing. Mr. Francis informed the realtor that, based on his review of the deed, the Petitioners did not own the garage and should

discontinue the listing. Respondents' Brief, p.5; J.S. ¶28. Later that day, Respondents purchased the property at 2205 First Street in foreclosure.

By the Respondents' own admissions, they took no steps whatsoever to determine how the Petitioners could believe they still owned the garage in contravention to the plain language of the 2009 deed. They did not question the realtor.[1] They did not question the Petitioners. There is no evidence they questioned anyone who knew Mr. Hunt or any of his neighbors during the time he owned the property. Simply put, the Respondents obtained the deed and three days later purchased the property at 2205 First Street with the knowledge the Petitioners were claiming ownership of the garage and nearly half the acreage of the property.

"If one has knowledge or information of facts sufficient to put a reasonable man on inquiry, as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to prosecute the same; and, if he wholly neglects to make inquiry, the law will charge him with knowledge of all facts that such a reasonable inquiry would have afforded." Syl. pt. 4, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co. et al.*, 63 W.Va. 685, 60 S.E. 890 (1908). At a minimum, a "reasonable inquiry" required the Respondents to investigate the source of the Petitioners' belief that they still owned the garage. They made no such inquiry let alone a "reasonable" one.

Both the trial court and the Respondents contend that because Mr. Hunt was deceased, it was not possible for the Respondents to learn whether any mistake in the deed was a "mutual

[1] Petitioners' realtor testified that had she been questioned by the Respondents in 2009 concerning the status of the garage, a simple review of her file from the sale would have revealed that the garage had been excluded from the sale to Hunt. Appx. Vol. 3, p. 205.

mistake," and, therefore, it would be unfair for the Respondents to lose their status as *bona fide* purchasers.

> The defendants could not possibly be on notice of whether any mistake was mutual between the plaintiffs and a deceased person they never met. To require purchasers to search for a mutual mistake between such remote conveyers to be bone fide purchasers will not be commissioned by this Court.

*Appx. Vol. I*, p. 6; Final Order, ¶27.

As noted above, uncovering the truth as to the Petitioners' belief in their ownership of the garage would have required only a phone call to the realtor or to the Petitioners' themselves. After all, the mere fact the Petitioners were listing the garage for sale with the property next door was certainly a red flag as to whether the Petitioners had sold the garage to Hunt ten years earlier.

The trial court's finding that Respondents were bona fide purchasers because they could not have been on notice of a "mutual mistake" in the deed is a misapplication of the law. Under *Pocahontas Tanning*, Respondents were placed on inquiry notice one they had "knowledge or information of facts sufficient to put a reasonable man on inquiry, as to the existence of some right or title in conflict with that which [they were] about to purchase." *Id.* Once Respondents obtained the 2009 deed to Hunt, they were on inquiry and had a duty "to prosecute the same." Upon being placed on inquiry the Respondents took no action before purchasing the property despite their knowledge of the Petitioners' adverse claim to the garage.

The Respondents contend that Mr. Hunt's death forecloses their proving that a "mutual mistake" occurred in the execution of the 2009 deed. This is incorrect. Parol evidence may be used to prove a mutual mistake of the parties to a deed or a mistake by the drafter in failing to conform the deed to the parties' intention. Syl. pt. 3, *Johnston v. Terry*, 128 W.Va. 94, 36 S.E.2d 489 (1945). The Petitioners have presented substantial evidence that Hunt and the Petitioners each believed that Hunt had only purchased the residence at 2205 First Street and not the garage.

Indeed, Respondents have stipulated to the truth of most of the relevant facts demonstrating that a mutual mistake had occurred in the drafting of the description to the property to have been conveyed in the 2009 deed.

Respondents contend that for the Petitioners to prove the existence of a mutual mistake entitling them to a reformation of their prior deed, they must show that Respondents were themselves parties to the mistake and that a "mutual mistake" by Respondents' predecessor-in-title is insufficient. This contention is unsupported by this Court's precedents.

> A court of equity has power and jurisdiction to decree the reformation of a deed executed through a mutual mistake of the parties as to what is intended therein, or through a mistake of the scrivener in failing to make the agreement express the mutual intention of the parties, ***where such reformation is sought as between the parties, or the successor of either,*** who, at the date he acquired an interest in the property affected by such deed, had notice of the grounds on which reformation is sought.

Syl. pt. 1, *Johnston v. Terry,* 128 W.Va. 94, 36 S.E.2d 489 (1945); *Cothern v. Jones*, 2015 W.Va. Lexis 851, *10, 2015 WL 5086619 (2015); *see* also *Gullett v. Burton*, 176 W.Va. 447, 335 S.E.2d 323 (1986) (mutual mistake affirmed in predecessor's deed).

Respondents rely on *Myers v. Stickley*, 180 W.Va. 124, 375 S.E.2d 595 (1988) as support for their contention that the immediate purchaser must have participated in the mutual mistake for a deed to be reformed. Respondents read too much into *Myers*. The Court's discussion of the Myers' lack of involvement in the mistake was only one part of its review of the evidence of mutual mistake which was before the circuit court. In fact, after noting the Myers' lack of involvement in the mistake, the Court then discusses the evidence of the Myers' predecessor's involvement in the mistake. "The record contains no evidence that the Myers participated in the mistake. *The only evidence presented concerning the participation of the Days, predecessors in interest to the Myers, was Mr. Detrick's testimony that he showed everyone where he thought the land was located.*"

*Myers*, 180 W.Va. at 127, 375 S.E.2d at 598. Had the Myers non-involvement in the mistake been determinative, there was no need for the Court to review the evidence of the Myers' predecessor in title's involvement in the mistake. Instead of supporting Respondents' claim, Myers has the opposite effect.

The Respondents invoke the doctrine of laches in their brief to support an affirmance of the judgment. The trial court did not address this defense at the hearing or in its Final Order. Laches has no application in this case.

> Mere delay will not bar relief in equity on the grounds of laches. "Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party was waived his right."

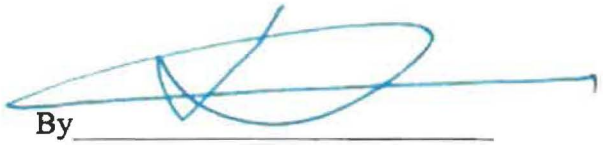
Syl. pt. 1, *State ex rel. Smith v. Abbot*, 187 W.Va. 261, 418 S.E.2d 575 (1992).

There is no evidence that the Petitioners sat on their rights to the garage following their sale of the 2205 First Street residence to Hunt. Indeed, the parties have stipulated that following Hunt's purchase, Petitioner continued to use the garage and surrounding yard to support her veterinary practice up to the time of its closure in 2016. Appx. Vol. 1, pp. 28-29, J.S. ¶¶18-22.

## CONCLUSION

The trial court's finding that Respondents were *bona fide* purchasers of the garage and surrounding tract was clearly erroneous. Petitioners respectfully ask that the Court reverse the decision of the Circuit Court of Marshall County and direct the court to enter judgment for the Petitioners.

**JODY L. OELSCHLAGER, DVM**
**and CHARLES K. WILSON,**
**Plaintiffs Below, Petitioners**



By_____
Counsel for Petitioners

D. Kevin Coleman (W. Va. State Bar # 6018)
FARMER, CLINE & CAMPBELL, PLLC
453 Suncrest Towne Centre Drive, Suite 300
Morgantown, WV 26505
(304) 225-5990

## CERTIFICATE OF SERVICE

Service of the foregoing PETITIONERS' REPLY BRIEF was made upon Respondents First Class U.S. Mail and electronic mail on the 9th day of March 2022 addressed as follows:

Thomas E. White, Esq.
604 6th Street
Moundsville, WV 26401
Counsel for Respondents

**JODY L. OELSCHLAGER, DVM**
**and CHARLES K. WILSON,**
**Plaintiffs Below, Petitioners**

By_____
Counsel for Petitioners

D. Kevin Coleman (W. Va. State Bar # 6018)
FARMER, CLINE & CAMPBELL, PLLC
453 Suncrest Towne Centre Drive, Suite 300
Morgantown, WV 26505
(304) 225-5990